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NOTES.

PUBLICATION OF PHOTOGRAPH AS AN ADVERTISEMENT.—In the present number of this REVIEW Judge O'BRIEN, of the New York Court of Appeals, defends the decision of that court denying any remedy, so long as the publication is not libellous, to a girl whose photograph had been used as an advertisement without her consent. *Roberson* v. *Folding Box Co.* 171 N. Y. 538. When the defendant's demurrer was overruled in the lower court (64 App. Div. 30), we commended the decision (see 1 COLUMBIA LAW REVIEW, 491); and, with due deference to the learned Judge, are still inclined to the same view.

The feeling that everyone has a right to a certain amount of privacy in his life is widespread. As to the extent of the right, however, this feeling is very indefinite. A right as extensive as that said by Chief Judge PARKER to have been claimed in the *Roberson* case, a "right to pass through this world, if a man wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon," would be more than the public would admit. It would be a very unsocial right. Everyone claims an antagonistic right to know some things about his fellows, things which are important for him to know politically, or in connection with business, and other things which interest him with merely a human interest. The line between the things which the individual has a right to keep to himself, and those in which society may have a legitimate interest, is yet to be drawn; it is a question of conflicting claims, and public opinion has not settled whether a newspaper has a right to print an account of a wedding with a picture of the bride, and whether one private citizen can take a snapshot photograph of another for his own amusement.

But there is a great difference between publishing a person's photograph for the satisfaction of social curiosity, and publishing it as an advertisement. In the former case privacy conflicts with a social claim, a right akin to freedom of thought and speech; in the latter, privacy is made to yield to the claim of another individual to make commercial profit. This difference is the foundation of the prevailing public belief that in the *Roberson* case there was a right invaded, whether the courts recognize such a right or not.

There being an injury, is there any remedy, or is the law at fault? The Court of Appeals has taken the latter view, suggesting remedial legislation. The reasons for refusing a remedy are, that otherwise a flood of litigation would ensue, and that a court of equity has no jurisdiction except where property is concerned. The first objection would be considerable, if a decision for the plaintiff would have established an indefinite right of privacy, a general right to be let alone. But that result would not necessarily follow, because the present case rests on narrower principles, as already shown. In regard to the second point, if a property basis really is necessary for equity jurisdiction, it is no great stretch of legal ideas to say that everyone has a property right in his own form, as was urged by RUMSEY, J., in the lower court. Its value as property is proved by the use made of it in the case in hand. When the description of property kept in private is an invasion of the owner's property rights, *Prince Albert* v. *Strange* (1849) 2 De G. & Sm. 652, 1 McN. & G. 25, the reproduction of a person's features for advertisement would seem no less so. But it may even be questioned whether a property basis is necessary. In reading *Gee* v. *Pritchard* (1818) 2 Swanst. 402, and *Prince Albert* v. *Strange, supra,* one cannot but feel that the real object of the courts in granting, as well as of the plaintiff in asking, the injunctions was to protect privacy, and the use of property rights as a ground of jurisdiction was merely a fiction. "Privacy is the right invaded," said Lord Chancellor COTTENHAM (1 McN. & G. 47), and the right of preventing publication altogether was considered at least as important as the right to the profits of publication. It would not be a greater step than has been taken at other times, to cast off the fiction of protecting property and in terms protect the more personal right.

The conservatism of the decision expresses the court's belief that society has reached a state where law must progress by legislation; but the general adverse criticism it has received indicates an opposing belief in Sir Henry Maine's generalization, that between the periods of fiction and legislation there is another agency in the growth of the law, namely, equity.

MUNICIPAL REGULATION OF STREET RAILWAY RATES.—Some light is thrown by the United States Supreme Court, in its decision in the case of the *City of Detroit* v. *The Detroit Citizens' Street Railway Co.* (1902), 22 Sup. Ct. 410, on what constitutes a contract as to rates between a municipal corporation and a street railway company, the power of the city to affect that contract by ordinances ordering reductions in rates and provision of free transfers, and the remedies which may be pursued by the company in the defense of its rights. While based strictly on a particular state of facts, the decision may,